UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Cr. 686 (LAK)

JAMES GATTO, a/k/a "Jim,"
MERL CODE,
CHRISTIAN DAWKINS,

Defendants.

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October 22, 2018
9:32 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge
and a Jury

APPEARANCES

ROBERT S. KHUZAMI
Acting United States Attorney for the
Southern District of New York
BY: EDWARD B. DISKANT
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Assistant United States Attorneys

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BY: MICHAEL S. SCHACHTER
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APPEARANCES (Cont'd)

NEXSEN PRUET LLC
Attorneys for Defendant Code
BY: MARK C. MOORE
-and-
MERL F. CODE

HANEY LAW GROUP PLLC
Attorneys for Defendant Dawkins
BY: STEVEN A. HANEY

Also present: SONYA JACOBS, Paralegal
SYLVIA LEE, Paralegal
ANTHONY CASOLA, FBI

(Trial resumed; jury not present)

THE COURT: Good morning, everybody.

ALL COUNSEL: Good morning, your Honor.

THE COURT: Do you have anything for me before I tell you what I have for you?

MR. DISKANT: Just one thing, your Honor. The parties are working right now on a proposed redacted version of the indictment to send back.

In connection with that, I think the parties are in agreement that we are going to strike reference to the University of Miami from the indictment just based on the way the case came in. So we similarly ask that to the extent the University of Miami is included in the charge, that the Court omit it as well. I am looking now, I'm not sure it is, but I just wanted to raise that.

THE COURT: Everybody agree?

MR. MOORE: Yes, sir, your Honor. We agree. And I think, after having some time to look at the government's proposed redactions, I think the defense agrees to all the government's proposed redactions, including the additional redaction -- complete redaction of "Miami."

THE COURT: Mr. Haney.

MR. HANEY: Your Honor, I'm still reviewing, but I would concur with Mr. Moore at this point with what he just said.

THE COURT: Well, but I need to know.

MR. HANEY: Yes, your Honor. I would agree. Thank you.

THE COURT: Thank you.

Mr. Schachter.

MR. SCHACHTER: Yes, your Honor.

THE COURT: OK. We have two notes from the panel. And Andy tells me we are missing six jurors at the moment, so. Juror No. 8, Ms. Suchman-Zeolla, writes as follows:

"If you recall during jury selection, I mentioned that my son is currently applying to high schools for next year and that we had a number of tours scheduled in the second half of October. I was able to make arrangements to get my son to all of his tours except for one on October 23rd that is to take place from 9 to 10:30.

"Please consider that applying to public high school in New York City is unusual. There is no zoned school for your neighborhood, at least in Manhattan where we live. You need to research many schools and rank them on a list. The schools in turn rank the students, and the Department of Education then makes matches. It is extremely competitive, and in order to make wise decisions for and with your child, touring the schools is highly important.

"Please also consider that spots on tours are limited and not easy to secure. They fill up within minutes and you

are not allowed to make changes. I spent a lot of time and effort securing our spots on these tours at the beginning of the school year and scheduled them before and after the first half of October to accommodate potential jury duty service of two weeks average.

I feel uncomfortable asking you to work around my schedule. This probably doesn't seem as important as the scope and nature of this trial, but if there is any way to start later in the day on October 23, I would greatly appreciate it. This is a very important phase of my son's educational experience.

"Thanks for your consideration."

We will mark that Court Exhibit G.

Then I have a letter this morning from Mr. Peterson, Alternate No. 1:

"Dear Judge Kaplan:

"On Friday I became aware of the NBA plan to allow selected 18 year-old elite prospects to play in the NBA developmental (NBA G) league for what would have been the player's freshman year. Players could receive a salary of up to $125,000 and are free to sign sponsorship agreements.

"I read about the plan in the Friday edition of The New York Times. Since the article was about the NBA developmental league, the subject did not strike me as being prejudicial to my role as a juror. There was no mention of our

case, the defendants, the schools, or Adidas in the article.

"However, a primary purpose of the NBA plan is to reduce the problematic involvement of sneaker companies and agents with the players prior to entering college, which is clearly at issue in the case.

"Having not yet received your instructions on the law, I cannot say whether knowing of the NBA plan will influence my decisions in this case. That being said, I do feel that the NBA plan is a better response to the underlying conditions that led to this case than whatever will be achieved by finding the defendants guilty or not guilty.

"If an objective of justice is to direct people's behaviors to that which is right, then I feel justice in this case is well served by the NBA plan. Should it still be an option, my opinion is that best resolution to the case would be for the government and the defendants to strike a deal wherein the defendants promise to cease undisclosed activities that would put an athlete's amateur status at risk, without admitting guilt to the fraud charges.

"I fully understand that I'm just a juror (and an alternate at that), and that my opinions carry no weight with the court. But I do feel it necessary to convey that I encountered the article, and how it has altered my perspective of the case.

"I have not discussed or in any way communicated with

my fellow jurors about the article or the NBA plan."

That will be marked Court Exhibit H.

The third point I want to draw to your attention to before we get into this is that I've been thinking about what, if anything, ought be done about the fact that the jurors were told at the beginning, when we thought this case would last considerably longer, that we would not sit Fridays and that we would be dark next Monday, Tuesday, Wednesday. For all I know, we're going to have a verdict today and this will all be academic, but I need to think about what we do if we don't have a verdict by Thursday, particularly because if any change is to be made in the scheduled, the jurors need to know it and we need to know it fast.

So, counsel, put on your thinking caps. What do you folks want to do about these notes and about the schedule?

MR. DISKANT: Your Honor, from the government, we have no objection to starting a little bit late tomorrow to accommodate Juror No. 8. It seems like a very legitimate excuse that she raised at the outset, and it seems like she could probably be here by 11 or 11:30 such that the jury could still get a relatively full day in.

With respect to Alternate No. 1, it seems like at this point he could no longer be fair and impartial for any number of reasons, given his stated views on issues that are outside of the record, and so we would ask the Court to excuse him,

particularly given that there are five other alternates.

And with respect to scheduling, perhaps the Court might inquire of the jury at this point whether they would be open to sitting on Friday, if in fact we get to Friday, since it does sound like the Court's schedule would not permit us to sit the front half of next week. And if the jury yes, terrific, we've gotten an extra day this week, and if the jury says no, then we'll pick up when they are next available.

THE COURT: Mr. Schachter?

MR. SCHACHTER: May we confer?

MR. MOORE: Can we confer for just one moment, your Honor?

(Pause)

Your Honor, let's take those in reverse.

With respect to scheduling, does your Honor's schedule permit you to be here on Friday if they want to work on Friday?

THE COURT: The short answer is I could cancel prepaid tickets and try to rebook a flight over the weekend.

MR. DISKANT: I apologize, your Honor. I didn't realize the Court was not available on Friday.

THE COURT: No. No. No. Look, I will do it. I will do it if need be if the jury is available.

MR. MOORE: Because I'm hoping that it's going to be academic and we are not going to need to be here.

THE COURT: I, too.

I will certainly do it. I will be here if I need to be.

MR. MOORE: The only concern that I have is if you tell them now that you might be available on Friday or Monday, then they may think, OK, well, we should just take a very leisurely pace, etc.

I would prefer not to say anything to them now about Friday or Monday and cross that bridge only if and when we get to it. That would be my preference, and I think I speak for defense counsel on that, that we just not deal with the scheduling issue and hope that we won't have to and perhaps revisit that issue on Wednesday if it appears that we may have to revisit the issue.

With respect to the jurors, we have no objection to starting late tomorrow to accommodate Juror No. 7.

With respect to the first alternate, however, your Honor has read into the record his note. One could assume from that note that he can no longer be fair and impartial, but he has not said that. So, I would request that before your Honor excuse him, that your Honor would voir dire him on the issue as to whether he could set aside what he read, set aside the views he expressed, and be fair and impartial, if he expressed to serve. It doesn't look like he's going to be, but that is what we would --

THE COURT: As of 9:39, we are still short five

jurors.

MR. MOORE: OK. You know, my original thought when I heard that No. 7 was having an issue is that we should just excuse her, but now I don't think that is the case. I think we should accommodate her schedule.

THE COURT: Does anybody have any reaction to my saying to the jurors that they should be prepared this week to stay late?

MR. MOORE: I think that's a really good idea, Judge.

MR. DISKANT: Fine with the government.

THE COURT: OK. All right. Let's bring Mr. Peterson to the robing room with the reporter and we'll see. And let me have his note.

(In the robing room)

THE COURT: Come on in, Mr. Peterson. Have a seat.

JUROR: Hello, everybody.

THE COURT: Thank you for your letter. You did the right thing. I appreciate it.

If you wind up on the jury, can you put all of this aside and decide this case according to my instructions based on the evidence in this case, or is it something you don't think you can do?

JUROR: Well, since I haven't received the instructions, I don't know for sure. I know that this did kind of change my outlook on the entire situation. I do feel I

would be able to judge it just on it myself. But on the -- you know, kind of on the border of -- you know, I feel like what the NBA is doing fundamentally changes the environment, fundamentally changes the incentives.

THE COURT: I'm not sure -- I don't really know, but I'm not sure it is clear that they are doing it as opposed to thinking about it.

JUROR: The article seemed to indicate -- they announced it, you know, it is their plan.

THE COURT: You may be right. I am frank to say, I didn't read the article.

What is your best judgment, can you be fair and impartial and decide the case according to my instructions, whatever they are?

(Pause)

JUROR: I want to say -- yes. I mean, you know, I -- I have been a consultant for much of my life and I have to incorporate many different thoughts.

THE COURT: Counsel, any other questions you would like me to put to Mr. Peterson?

MR. HANEY: No, your Honor.

MR. MOORE: No, your Honor.

THE COURT: OK. Thank you, Mr. Peterson. You can go back in the jury room.

JUROR: OK.

(Juror not present)

THE COURT: Anything further to be said on him?

MR. DISKANT: Your Honor, I think, from the government's perspective, he gave extreme equivocation on this issue. It is clear that he is a very thoughtful person, and I do not doubt that he is trying his best. But his letter lays out his very fervent views on how this case should be resolved in a manner that would be fundamentally inconsistent with following the Court's instructions. He spent a great deal of time on this. He was not able to unequivocally and clearly state that he was going to be a fair and impartial juror and that he would following your instructions. Particularly given that there are five other alternates and given the contents of the letter, we think he should be excused for cause.

MR. MOORE: Your Honor, I think that he answered your question twice. I agree with Mr. Diskant that he is thoughtful, and so he thought about his answers when he was answering your Honor's questions. And he said on both occasions that he could put aside his views and be fair and impartial. He said, at the end, that he had been a consultant for a long time, he had to deal with various conflicting views, and he understands that his role as a juror is to follow your Honor's instructions.

I respectfully request that your Honor deny the motion to strike him for cause.

THE COURT: Denied, Mr. Diskant. I mean, I paid close attention to him and to the letter, and I accept what he said.

MR. DISKANT: Your Honor, may I make one follow-up request for the Court's consideration?

I believe what he said both in the letter and the first time your Honor put the question to him was that he hadn't yet been instructed. And so should we get to a situation in which this juror does need to be seated, we would ask that the Court reinquire, having been instructed, of the juror whether he is able to follow your instructions.

MR. MOORE: I have no objection to that, your Honor.

MR. HANEY: Fair.

THE COURT: I think that is a good suggestion, a fair suggestion.

OK. That's that.

OK. I think we in waiting mode.

THE CLERK: We are missing three as of the moment.

(Discussion off the record)

(Continued on next page)

(In open court)

THE COURT: OK. We have a jury.

THE CLERK: Jury entering.

(Jury present)

THE CLERK: The Court is about to charge the jury. All spectators must either remain seated throughout the duration of the charge or leave at this time.

THE COURT: OK. Good morning, everyone.

The jurors are all present. Defendants are all present.

A couple of housekeeping things before I start giving you my instructions.

Can I have that other note? Here it is. Never mind.

Ms. Suchman-Zeolla, am I pronouncing that right? OK. We'll start late tomorrow to let you make that school interview.

How early do you think you can get here?

JUROR: 11:15.

THE COURT: OK. So, members of the jury, if we don't have a result today, we'll start tomorrow at 11:15.

Now, we are also dealing with the schedule going forward, and in order to give you the maximum opportunity to resolve the matter before we have indicated we'll have a break, the plan will be to ask you to stay late, if you need the time, tomorrow, Wednesday and Thursday. You will be provided with

lunch and dinner once you start deliberating, and by "late" I mean approximately 8 or 8:30. We also have the ability to set up car services to get you home or at least close to home, and we will do that in light of the late hours.

So, if that's a serious problem for anybody, I need to know it today. It all may be academic. I'm not by indicating that suggesting anything about how long you should or shouldn't deliberate, that's totally up to you, but I'm just looking at the calendar and we've consulted with counsel.

OK. We are all set.

Be aware, it is hard for me to sit still for two hours and read constantly so I periodically may stand up and speak to you standing up. It doesn't mean anything except I'm restless.

(Continued on next page)

CHARGE

THE COURT: OK. You folks are about to perform your final function as jurors. My instructions to you are in four parts. First, I am going to describe the law to be applied to the facts as you find the facts to have been established by the proof; second, I will instruct you about the trial process; third, I will speak to you concerning your evaluation of evidence; and, finally, I'll speak to you about the conduct of your deliberations.

You are welcome to take notes. I alert you also, however, that you will all have typewritten copies of these instructions in the jury room.

The defendants, James Gatto, Merl Code, and Christian Dawkins, are formally charged in what's called an indictment. An indictment is merely an accusation. It's not evidence. It's not proof of anybody's guilt. It doesn't create any presumption. It doesn't permit any inference that the defendants are guilty.

Each count in the indictment charges a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each defendant on each count in which the defendant is charged. Whether you find a defendant guilty or not guilty as to one offense should not affect your verdict as to the other offenses. Similarly, whether you find one defendant guilty or not guilty to one of

the charges should not affect your verdict as to the other defendants charged with the same offense.

There are three counts in this indictment. Count One charges all three defendants with participating in a conspiracy to commit mail fraud. Count Two charges all the defendants with wire fraud in connection with an alleged scheme to defraud the University of Louisville. Count Three charges James Gatto with wire fraud in connection with an alleged scheme to defraud the University of Kansas.

My law clerk, Rachel, hands me a note saying I said "mail fraud" instead of "wire fraud." I do it again. Anytime I say mail fraud, it is a mistake. It is wire fraud. The two statutes are substantially identical except one involves telephones and wires, one involves mail, and we probably try more mail frauds than wire frauds. What can I say? It is a habit.

With any criminal charge, there are certain basic facts that the government must prove beyond a reasonable doubt before a defendant may be found guilty. Those basic, necessary facts are called the essential elements of the charge.

The defendants have pleaded not guilty to the charges in the indictment. The burden is on the prosecution to prove guilt beyond a reasonable doubt. That burden never shifts to the defendants.

The law presumes each of the defendants to be innocent

of the charges against him. I therefore instruct you that each defendant is presumed innocent throughout your deliberations until such time, if ever, that you as a jury are satisfied that the government has proved that defendant guilty beyond a reasonable doubt. If the government does not sustain its burden on one or more counts, you must find the defendant not guilty on that count or counts.

I have said that the government must prove the defendant guilty beyond a reasonable doubt -- each defendant, of course. A reasonable doubt is a doubt based on reason and common sense. It is a doubt that a reasonable person would have after carefully weighing all the evidence, or lack of evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her own personal life. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt about a defendant's guilt with respect to a charge in the indictment, it is your duty to acquit the defendant on that charge. On the other hand, if after fair and impartial consideration of all the evidence or lack of evidence, you are satisfied of a defendant's guilt on a particular charge beyond a reasonable doubt, you should vote to

convict on that charge.

Let me turn to the indictment.

As I have told you, Count One of the indictment charges the defendants with the crime of conspiracy. The other two counts charge what we call substantive crimes.

As I explained to you a couple of weeks ago now, a conspiracy is a little different from a substantive count. A conspiracy charge, generally speaking, alleges that two or more persons agreed together to accomplish some unlawful objective. The focus of a conspiracy count, therefore, is on whether there was an unlawful agreement. A substantive count, on the other hand, charges a defendant with the actual commission, or with causing someone else to engage in certain actions necessary for the actual commission, of an offense. A substantive offense therefore can be committed by a single person. It need not involve any agreement with anyone else.

A conspiracy to commit a crime is an entirely separate and different offense from a substantive crime, the commission of which may be an objective of a conspiracy. And since the essence of the crime of conspiracy is an agreement or an understanding to commit a crime, it doesn't matter if the crime, the commission of which was the objective of the conspiracy, ever was actually committed. In other words, if a conspiracy exists and certain other requirements are met, the conspiracy is punishable as a crime even if its purpose is not

established or accomplished. Consequently, in a conspiracy charge, there is no need to prove that the crime or crimes that were the objective or objectives of the conspiracy actually were committed.

By contrast, conviction on a substantive count requires proof that the crime charged actually was committed or attempted, but it does not require proof of an agreement.

With respect to the substantive counts, you should be aware also that there are three alternative theories on the basis of which you may find a defendant guilty. While I am going to explain these three theories in more detail, I want to take a very brief moment to outline them briefly.

The government's first theory is that one or more of the defendants committed a substantive crime charged in the indictment. The second theory is that one or more of the defendants, with criminal intent, willfully caused someone else to engage in certain actions that resulted in the commission of a substantive crime charged in the indictment. I am going to refer to both of those two theories that I just outlined for you as involving a claim that a defendant is guilty of a crime as a principal.

The third theory is that someone other than a defendant charged in the indictment with a particular substantive crime committed that crime and the defendant you are considering aided and abetted the commission of that crime.

I will refer to that theory as a claim that the defendant is guilty of a crime as an aider and abettor.

Now, for the sake of convenience, in organizing my instructions to you, I'm going to instruct you first with respect to the two counts that charge substantive crimes, Counts Two and Three. I'll instruct you initially on the first two theories of liability, namely, that the defendants are guilty as principals of the substantive crimes charged in the indictment (as the counts apply to each defendant) either because they themselves committed the substantive crimes or because they, with criminal intent, caused someone else to commit the substantive crimes. I then will instruct you on the third theory of liability -- that is, the alternative theory that the defendants are guilty as aiders and abettors. Finally, I will instruct you on the conspiracy count.

Now, as I instructed you at the beginning of this trial, certain of the conduct at issue here allegedly violated rules of the NCAA, including rules on amateurism. So, you have heard testimony and were shown exhibits regarding NCAA rules, and you in fact have the whole NCAA Division I manual in evidence.

Now, the purpose of this trial is not to determine whether the NCAA amateurism and recruiting rules are good or bad. During your deliberations, you must apply my instructions on the law to the facts that you find the government has proved

beyond a reasonable doubt. Any views or opinions you might have about the wisdom or the fairness of any NCAA rules have no bearing on this case whatsoever and should not be considered by you in any respect during your deliberations. You should disregard also any arguments made by the lawyers about the wisdom or fairness of those rules.

In addition, I instruct you that a violation of an NCAA rule, by itself, is not a violation of the law. This case, however, is not about whether violations of NCAA rules occurred. There is no dispute that NCAA rules were violated. Rather, this case essentially is about whether the universities that are alleged to have been victims or intended victims of the crimes that are charged in the indictment were fraudulently misled about whether violations of NCAA rules had occurred. I will give you more detailed instructions on this point in a moment, which you will follow in all respects.

Now, let me make one final point before I begin my specific instructions on the counts charged in the indictment. Each of the alleged victims and intended victims of the crimes charged in the indictment is a university. Universities, of course, are not human beings. They can think or act only through their agents -- that is to say, their officers, their employees, and their other authorized representatives. So, the knowledge, the intentions, the statements, and the actions of a university officer, employee, or other representative -- and

that includes basketball coaches -- are considered to be those of the university to the extent, but only to the extent, that the officer, employee, or other representative is, first of all, acting within the scope of the authority of that officer, agent, or representative and, second of all, without any purpose to profit personally or otherwise benefit him or herself in a manner that is not fully aligned with the interests of the university.

Now, we come to Counts Two and Three, the two substantive wire fraud counts.

Count Two charges that from at least in or about May 2017, up to and including in or about September 2017, Messrs. Gatto, Code, and Dawkins each participated in a scheme to defraud the University of Louisville of athletic scholarship funds and of the right to control the use of its assets, including the ability to decide how to allocate a limited number of athletic scholarships, by making, or causing to be made, material misrepresentations, using interstate wires, in connection with obtaining a scholarship from the University of Louisville for Brian Bowen, Jr. to play basketball for the University of Louisville.

Count Three charges that from at least in or about October 2016, up to and including in or about November 2017, Mr. Gatto participated in a scheme to defraud the University of Kansas of athletic scholarship funds and of the right to

control the use of its assets, including the ability to decide how to allocate a limited number of athletic scholarships, by making, or causing to be made, material false representations, using interstate wires, in connection with obtaining a scholarship from the University of Kansas for Billy Preston to play basketball for that school.

For each of these two counts the government must prove the following three elements:

First, it must prove that there was a device, scheme, or artifice to defraud the relevant university of money or property by false or fraudulent pretenses, representations or promises. It must prove, second, that the defendant you are considering knowingly and willfully participated in the device, scheme, or artifice to defraud, with knowledge of its fraudulent nature, and with specific intent to defraud. It must prove, third, that is in the execution of that device, scheme, or artifice, the defendant you are considering used, or caused to be used, interstate wires.

The first element the government must prove beyond a reasonable doubt is the existence of a device, scheme, or artifice to defraud the victim of money or property by false or fraudulent pretenses, representations or promises. In Count Two, the alleged victim is the University of Louisville. In Count Three, the alleged victim is the University of Kansas. The instructions on the elements that the government must prove

beyond a reasonable doubt to establish wire fraud are the same on both counts. The only difference is the victim.

Now, let me define some of the terms specific to wire fraud that I have used.

"Fraud" is a general term. It is a term that includes all of the possible means by which a person seeks to gain some unfair advantage over the victim by intentional misrepresentation or false pretenses.

A "device, scheme, or artifice to defraud" is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. It is, in other words, a plan to deprive another of money or property by trick, deceit, deception, swindle, or overreaching.

A representation is false if it is true at the time when it was made. A statement also may be false if it is ambiguous or incomplete in a manner that makes what is said, or represented, misleading or deceptive. A representation or statement is fraudulent if it was made falsely and with the intent to deceive.

Now, the government in this case says that the fraudulent scheme, charged in each of Count Two and Count Three, was carried out by two different means. The first means, that the government argues, is that the student-athletes who received athletic scholarships from the University of

Louisville or the University of Kansas, as the case may be, made false representations in the form of certifications to those universities. The second means is that the parents of the student-athletes who got athletic scholarships from the universities in question made false representations, also in the form of certifications to the universities. Now, the instructions here are a little bit different depending on your consideration of whether a false statement was made by a student-athlete or by a parent of a student-athlete.

As to the student-athletes, there is no contention in this case that the student-athletes knew that any certifications they signed and submitted to the universities were false at the time that they were signed and submitted. In other words, there is no contention that the student-athletes themselves were trying to deceive the universities because they didn't know that they were making any false statements. Instead, the government alleges that the alleged false certifications submitted by the student-athletes served as the means for a scheme to defraud because of the defendants' roles in causing those false statement to be made. I therefore instruct you that, to the extent the existence of an alleged scheme to defraud is based on an allegedly false certification, signed and submitted by a student-athlete, the government must prove beyond a reasonable doubt that the defendant you are considering, with the specific intent to defraud the university

in question, willfully caused the making of the false certification by the student-athlete. I will explain the concepts of "intent to defraud" and "willful causation" to you in a few minutes.

My instructions are the same for any allegedly false certification submitted by a parent if you find beyond a reasonable doubt that the parent did not know that the certification was false at the time that the parent signed and submitted it. To the extent the existence of a scheme to defraud is based on such a false certification, the government must prove beyond a reasonable doubt that the defendant you are considering, with the specific intent to defraud the university in question, willfully caused the parent of the student-athlete to make the false certification.

Now, a different instruction applies, however, if the existence of a scheme to defraud is based on an allegedly false certification signed by a parent who knew that the certification was false when the parent signed and submitted it. In that case, you may find that a scheme to defraud existed on the basis of that certification -- provided that the government has proved beyond a reasonable doubt each of the other requirements on which I instruct you in respect of the first element of wire fraud; that is to say, if the government proves beyond a reasonable doubt either, first, that the defendant you are considering, with the specific intent to

defraud the university in question, willfully caused the parent to make the false certification or, secondly, that the parent who signed and submitted the certification knew that the certification was false when the parent signed and submitted it.

But the existence of a false statement is not the end of your inquiry. For any false or fraudulent representation to be a basis for a scheme to defraud, the government must prove beyond a reasonable doubt also that the false or fraudulent representation relates to a material fact or matter. A material fact is one that would reasonably be expected to influence, or that is capable of influencing, the decision of the decision-making person or entity to which it was directed.

Now, in this case, the "decision-making entity" to which false or fraudulent representations allegedly were directed is the University of Louisville in Count Two and the University of Kansas in Count Three. I previously instructed you that universities can think and act only through their authorized agents who are acting without any purpose to profit personally or otherwise to benefit him- or herself in a manner that is not fully aligned with the interests of the university. You should apply that instruction here.

This mean that, for purposes of Count Two, if you find beyond a reasonable doubt that a false or fraudulent representation was made, you must determine whether that

representation was one that was capable of influencing the appropriately authorized and unconflicted officers or employees of the University of Louisville in deciding whether to provide a scholarship to Brian Bowen, Jr. For purposes of Count Three, if you find beyond a reasonable doubt that a false or fraudulent representation was made, you must determine whether that representation was one that was capable of influencing the appropriately authorized and unconflicted officers or employees of the University of Kansas in deciding whether to provide a scholarship to Billy Preston. The same principle applies to statements that are misleadingly or deceptively ambiguous or incomplete.

Now, it is not necessary for the government to prove that any particular person actually relied upon, or actually suffered damages as a consequence of, any false or fraudulent representation. Nor do you need to find that the defendant you are considering profited from the fraud. Here again my instructions differ somewhat depending on whether the individual who made a false representation (to the extent you find that any such false representation actually was made) knew that the representation was false at the time they made it. If you find beyond a reasonable doubt that a false representation was made by an individual who did not know that the representation was false, you must find that the defendant you are considering willfully caused the false representation to be

made as part of a fraudulent scheme in the expectation that it would be relied upon by the university in question. If you find beyond a reasonable doubt that a false representation was made by an individual who did not know that the representation was false, you must find that the individual made that false representation as part of a fraudulent scheme in the expectation that it would be relied upon by the university in question. In either case, you must concentrate on whether there was such a scheme, not on the consequences of the scheme.

I instruct you further that in determining whether a scheme to defraud existed, it is irrelevant whether you believe that the university in question might have discovered the fraud if it had looked more closely or probed more extensively. A victim's negligence or gullibility in failing to discover a fraudulent scheme is not a defense to wire fraud. On the other hand, a finding that a university intentionally turned a blind eye to certain kinds of representations when making decisions about scholarships may be relevant to the materiality of the representations.

Finally, the government, in order to satisfy this first element of substantive wire fraud, must prove beyond a reasonable doubt that the alleged scheme contemplated depriving the victim -- that is to say, the University of Louisville in Count Two and the University of Kansas in Count Three -- of money or property. It is no doubt obvious that property

includes tangible property interests, such as physical possession of an object or of money. But a victim can be deprived of money or property also when it is deprived of the ability to make an informed economic decision about what to do with its money or property -- in other words, when it is deprived of the right to control the use of its assets. I instruct you that a victim's loss of the right to control the use of its assets constitutes deprivation of money or property if, and only if, the scheme could have caused or did cause tangible economic harm to the victim.

A scheme to defraud does not have to be shown by direct evidence. It can be established by all the facts and circumstances in a case.

Now we move on to the second element of substantive wire fraud. It is a lot shorter.

The second element that the government must prove beyond a reasonable doubt to establish substantive wire fraud is that the defendant you are considering knowingly and willfully participated in the scheme, device, or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud.

To act "knowingly" means to act intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness.

To act "willfully" means to act with knowledge that

one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with the bad purpose to disobey or disregard the law. "Unlawfully" simply means contrary to law. In order to know of an unlawful purpose, a defendant does not have to know that he was breaking any particular law or any particular rules. He needs to have been aware only of the generally unlawful nature of his actions.

To prove that the defendant you are considering acted with specific intent to defraud, the government must prove that he acted with intent to deceive for the purpose of depriving the relevant University of something of value. As I mentioned earlier, that may include the right to control money or property if the loss of the right to control money or property could have resulted or did result in tangible economic harm to the university. The government doesn't have to prove that the university actually was harmed, only that the defendant you are considering contemplated some actual harm or injury to the university in question. In addition, the government need not prove that the intent to defraud was the only intent of the defendant you are considering. A defendant may have the required intent to defraud even if the defendant was motivated by other lawful purposes as well.

To participate in a scheme means to engage in it by taking some affirmative step to help it succeed. Merely associating with people who are participating in a scheme --

even if the defendant you are considering knew what they were doing -- is not participation.

It is not necessary for the government to establish that the government -- excuse me -- that the defendant you are considering originated the scheme to defraud. It is sufficient if you find that a scheme to defraud existed, even if someone else originated it, and that the defendant, while aware of the scheme's existence, knowingly and willfully participated in it with intent to defraud. Nor is it required that the defendant you are considering participated in or had knowledge of all of the operations of the scheme. The responsibility of the defendant is not governed by the extent of his participation. For example, it is not necessary that the defendant have participated in the alleged scheme from the beginning. A person who comes in at a later point with knowledge of the scheme's general operation, although not necessarily all of its details, and who intentionally acts in a way to further the unlawful goals, becomes a participant in the scheme and is legally responsible for all that may have been done in the past in furtherance of the criminal objective and all that is done subsequently.

Even if the defendant you are considering participated in the scheme to a degree less than others, he nevertheless is equally guilty as long as the defendant knowingly and willfully participated in the scheme to defraud with knowledge of its

general scope and purpose and with specific intent to defraud.

Now, because an essential element of the crime charged, both in Count Two and Count Three, is intent to defraud, it follows that good faith on the part of a defendant that you are considering is a complete defense to the charge of wire fraud. An honest belief in the truth of the representations made or caused to be made by a defendant is a complete defense, however inaccurate the statements may turn out to be. Similarly, it is a complete defense if a defendant held an honest belief that the universities were not being deprived of the ability to make an informed economic decision in such a way as to expose them to a risk of tangible economic harm. Likewise, if you determine that a defendant held an honest belief that he could facilitate a payment to a family of a student-athlete without affecting the eligibility of that student-athlete to play in basketball games sponsored by the NCAA, you may find that such defendant lacked intent to defraud.

A defendant has no burden to establish a defense of good faith; it remains the government's burden to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. However, in considering whether or not a defendant acted in good faith, you are instructed that an honest belief on the part of the defendant, if such a belief existed, that ultimately everything would work out to the

benefit of the universities does not necessarily mean that the defendant acted in good faith. If the defendant you are considering knowingly and willfully participated in the scheme with the intent to deceive the university in question for the purpose of depriving it of money or property (including the right to control money or property if such loss of the right to control could have resulted in tangible economic harm), even if only for a period of time, then no amount of honest belief on the part of the defendant that the university ultimately would be benefited will excuse false representations that a defendant willfully caused to be made.

Now, as to certain of the universities, one or more of the defendants contends that they lacked intent to defraud because they acted in good faith at the request of one or more university basketball coaches. An individual who does not work for a university and who engages in (otherwise legal) conduct to mislead the university lacks an intent to defraud the university if three things are true: First, he or she was acting at the request of an agent of the alleged victim university; second, the agent had apparent authority to make that request; and, third, the agent appeared to be unconflicted and acting in good faith for the benefit of the victim university and not to serve his or her own interests in a manner that was not fully aligned with the interests of the university. I am now going to discuss each of these concepts

in more detail.

As to the first point, it is for you to determine whether the defendant that you are considering reasonably understood that one or more university coaches had requested that the defendant facilitate a payment to a student-athlete or his family.

As to the second point, an agent of a university generally has apparent authority to make a request of an outside party on behalf of that university if actions taken by other authorized representatives of the university caused the outside party reasonably to believe that the agent who made the request had the authority to make that request on behalf of the university. Again, because the burden to prove each defendant's guilt lies with the government, assuming you find that a defendant reasonably believed that a coach or another agent requested that defendant to make or cause the making of a payment to a student-athlete or his family, you then must determine whether the government has proved beyond a reasonable doubt that the defendant knew or should have known that the university had not authorized the coach to ask the defendant to make that payment or payments of that kind.

As to the third point, to the extent that you find that a defendant reasonably understood a university coach to have requested that the defendant make or cause the making of a payment to a student-athlete or his family, you must determine

also whether the government has proved beyond a reasonable doubt that the defendant did not honestly believe that the coach was unconflicted and acting in good faith. The question of what a defendant believed about a university coach's interests and intent is a question of fact for you to decide. However, it might be helpful if I elaborate briefly on what it means for an agent of a university to be unconflicted.

An agent of a university is unconflicted if his or her actions are fully aligned with the interests of the university. Anytime an agent takes an action, the agent might simultaneously be acting for the benefit of the university for whom the agent works and have an additional interest in profiting personally or otherwise benefiting him or herself. The agent's personal interests might be financial, they might being nonfinancial in nature. To be unconflicted, the agent's personal interests, to the extent the agent has any personal interests, must be completely aligned with the interests of the university. The agent may not sacrifice the interests of the university in favor of his or her personal interests to any extent.

(Continued on next page)

THE COURT: Now, the question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. Direct proof of knowledge and fraudulent intent almost never is available. Nor is it required. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he or she committed some act with fraudulent intent. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his or her words, his or her conduct, his or her acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from it. You may also infer, but are not required to infer, that people intend the natural and probable consequences of their actions. Accordingly, when the necessary result of a scheme is to injure others, fraudulent intent may be inferred from the scheme itself. As I instructed you earlier, circumstantial evidence, if believed, is of no less value than direct evidence.

The third and final element that the government must prove beyond a reasonable doubt is that the defendant you are considering used, or caused to be used, interstate wires (for example, phone calls, e-mail communications, or text messages) in furtherance of the scheme to defraud the University of

Louisville, in the case of Count Two, and the University of Kansas, in the case of Count Three.

The wire communication must be an interstate wire -- that is, it must pass between two or more states. The use of the wire need not itself be a fraudulent representation. It must, however, further or assist in some way in carrying out the scheme to defraud.

It is not necessary for the defendant you are considering to have been directly or personally involved in a wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating. In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the wires to be used by others. This does not mean that the defendant must specifically have authorized others to make the communication. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires reasonably can be foreseen, even though not actually intended, then he causes the wires to be used.

Finally, if you find that a wire communication was reasonably foreseeable and that the interstate wire communication charged in the indictment took place, then this element is satisfied even if it was not foreseeable that the

wire communication would cross state lines.

As to each scheme alleged in Count Two and Count Three, if you find that the government has failed to prove any of the three elements of either count beyond a reasonable doubt as to a particular defendant, then you must find that defendant not guilty on that count. On the other hand, if you find that the government has proved each element beyond a reasonable doubt as to a particular defendant, then you should find that defendant guilty on that count.

Now, as I instructed you earlier, the government's second theory of liability on the substantive mail fraud counts, Count Two and Count Three, is that the defendants are guilty of the substantive crimes charged in those counts as principals because they possessed the requisite criminal intent and willfully caused someone else to engage in actions necessary to commit the crimes. So I am now going to take a minute to discuss what it means for a defendant to be guilty as a principal through willful causation in the context of this case.

It is the law of the United States -- and I quote -- "that whoever willfully causes an act to be done which, if directly performed by that person, would be an offense against the United States, is punishable as a principal."

So what does the term "willfully caused" mean? It does not mean that the defendant you are considering must

physically have committed the crime or supervised or participated in the actual criminal conduct charged in the indictment. Rather, anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States is guilty as a principal. Accordingly, one who intentionally causes someone else to make a material false statement in connection with depriving a university of money or property, as I have defined that term previously, is guilty as a principal if the government proves that the person who causes the making of that false statement acted knowingly, willfully, and with the specific intent to defraud the university in question and satisfies the other elements of wire fraud that I have described to you. This is so even if the individual that was caused to make the false statement had no criminal intent.

Now, the defendants in this case maintain that the government has not proved beyond a reasonable doubt that the defendants knew that the false representations that are alleged to have been made to the universities pursuant to the alleged schemes to defraud would in fact be made to the universities.

In some circumstances, however, you may find that a defendant acted with the necessary knowledge as to particular facts on the basis that the defendant consciously avoided learning those facts by deliberately closing his eyes to what otherwise would have been clear.

Although, I told you before that acts done knowingly must be a product of an individual's conscience intention, a defendant's conscience intention, not the product of carelessness or negligence, a person may not willfully blind himself to what is obvious and disregard what is plainly before him. A person may not intentionally remain ignorant of facts that are material and important to his conduct in order to escape the consequences of criminal law.

We refer to this concept, this notion of blinding yourself to what is staring you in the face as "conscience avoidance." When one consciously avoids learning a fact, the law often treats that person as knowing the fact. An argument of conscious avoidance, however, is not a substitute for proof. It is simply another fact you may consider in deciding what the defendant knew.

I instruct you that with respect to the substantive wire fraud crimes charged in Counts Two and Three of the indictment, you may infer that the defendant you are considering knew that a false certification would be signed and submitted to a university if you find beyond a reasonable doubt that the defendant you are considering deliberately and consciously avoided learning or confirming that the false certification would be signed and submitted.

In other words, if you find beyond a reasonable doubt that the defendant you are considering was aware of a high

probability that a false certification would be made to the university in question, and that the defendant you are considering deliberately avoided learning or confirming that fact, you may find that that defendant knew that the false certification would be made. However, if you do not so find, then the defendant did not know that the false certification would be made.

That concludes my instructions on the government's burden of proof with respect to the first two of the three theories of liability in respect of the two wire fraud counts charged in the indictment. If you all agree that the government has proved a defendant guilty as a principal beyond a reasonable doubt on a substantive count in which that defendant is charged, you need not consider the third theory of liability as to that count and that defendant. But if you do not convict a defendant as a principal on a substantive count in which that defendant is charged, you then will consider whether the government has proved that defendant guilty on that count on the third theory, which is called aiding and abetting.

Now, I think this would be a good time to take a few minutes' rest before we get into aiding and abetting. So we will take ten minutes and return.

(Jury exits courtroom)

(Recess)

THE COURT: I am told that the jury is willing to stay

late tonight, although I have a limit on how late I can stay, and they are prepared to stay every night this week.

(Jury present)

THE COURT: Jurors and defendants are all present.

So we will continue.

I will now explain this third theory, this aiding and abetting theory, in greater detail.

It is unlawful for a person to aid, abet, counsel, command, induce, or procure someone else to commit an offense. A person who does that is just as guilty of the offense as someone who actually commits it. Accordingly, if a defendant is charged with a substantive count in the indictment, you may find that defendant guilty on that count if you find that the government has proved beyond a reasonable doubt that another person actually committed the crime and that the defendant you are considering aided, abetted, counseled, commanded, induced, or procured the commission of that crime.

In order to convict a defendant as an aider and abettor, the government must prove beyond a reasonable doubt two elements.

First, it must prove that a person other than the defendant whom you are considering, and other than a person the defendant willfully caused to take actions necessary for the commission of the crime, as I have described that concept to you previously, committed the crime charged. Obviously, no one

can be convicted of aiding or abetting the criminal acts of someone else if no crime was committed by the other person in the first place. Accordingly, if the government has not proved beyond a reasonable doubt that a person other than the defendant committed the substantive crime charged in the indictment, either count, then you need not consider the second element under this theory of aiding and abetting. But if you do find that a crime was committed by someone other than the defendant you considering, or someone he willfully caused to take actions necessary for the commission of the crime, then you must consider whether the defendant you are considering aided or abetted the commission of that crime.

Second, in order to convict on an aiding and abetting theory, the government must prove that the defendant you are considering willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly engaged in some affirmative conduct or some overt act for the specific purpose of bringing about that crime. Participation in a crime is willful if done voluntarily and intentionally, and with the specific intent to do something that the law forbids.

The mere presence of a defendant you are considering in a place where a crime is being committed, even coupled with knowledge that a crime is being committed, is not enough to make the defendant an aider and abettor. Similarly, a defendant's acquiescence in the criminal conduct of others,

even with guilty knowledge, is not enough to establish aiding and abetting. An aider and abettor must know that the crime is being committed and act in a way that is intended to bring about the success of the criminal venture.

To determine whether the defendant you are considering aided and abetted the commission of the crime, ask yourself these questions:

Did the defendant you are considering participate in the crime charged as something that the defendant wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor. If, on the other hand, your answer to any of these questions is no, then the defendant is not an aider and abettor.

Now, I understand that, depending on your view of the evidence, there may be a subtle distinction with respect to whether a defendant is guilty, if at all, as a principal or as an aider and abettor. The question is what is the difference between a defendant willfully causing someone else to take actions necessary for the commission of a crime as opposed to aiding and abetting someone else to commit a crime.

If this question comes up in your deliberations, you

should think of it in terms of the difference between causing someone to do something versus facilitating or helping someone to do it. If you are persuaded beyond a reasonable doubt that the defendant you are considering willfully caused someone else to take actions necessary for the commission of either of the substantive wire frauds charged in the indictment, you should convict him as a principal on that count. If, on the other hand, you are persuaded beyond a reasonable doubt that the defendant you are considering, with the knowledge and intent that I described, sought by his actions to facilitate or assist that other person in committing the crime, then he is guilty as an aider and abettor. One important difference between willfully causing and aiding and abetting another person to commit a crime, as I instructed you earlier, is that with respect to willful causation, the government need not prove that the defendant you are considering acted through a guilty person. With respect to aiding and abetting, however, the government must prove beyond a reasonable doubt that someone else committed the crime charged with the requisite intent.

If you find beyond a reasonable doubt that the government has proved that another person actually committed one or more of the substantive crimes charged in Count Two and Count Three and that the defendant you are considering aided or abetted that person in the commission of that offense, you should find that defendant guilty of that substantive crime on

an aiding and abetting theory. If, however, you do not so find, you must find the defendant you are considering not guilty of that substantive crime.

You may be happy to know that we are now done with the two substantive counts of the indictment.

So I turn to Count One, the conspiracy charge.

As I told you, a conspiracy is a kind of a criminal partnership -- a combination or agreement of two or more persons to join together to accomplish some unlawful objective.

Count One charges that from at least in or about 2015, up to and including in or about November 2017, Messrs. Gatto, Code, and Dawkins conspired with others, including, but not limited to, parents of certain student-athletes and certain basketball coaches, to commit wire fraud against one or more universities.

In order to sustain its burden of proof with respect to the conspiracy charged in Count One, the government must prove beyond a reasonable doubt each of two elements:

First, it must prove the existence of the conspiracy charged in Count One.

Second, it must prove that the defendant you are considering knowingly and willfully became a member of, and joined in, the conspiracy.

Starting with the first element, a conspiracy is a combination, an agreement or an understanding of two or more

people to accomplish by concerted action a criminal or unlawful purpose. Count One charges that the criminal or unlawful purpose was to commit wire fraud.

To establish a conspiracy, the government is not required to show that two or more persons sat down around a table and entered into a solemn pact stating that they had formed a conspiracy to violate the law and setting forth the details of the plans and the means by which the unlawful project is to be carried out, or the part to be played by each conspirator. It is sufficient if two or more persons come to a common understanding to violate the law. Since conspiracy by its very nature is characterized by secrecy, it is rare that a conspiracy can be proved by direct evidence of that explicit agreement. You may infer the existence of a conspiracy from the circumstances of this case and the conduct of the parties involved.

The adage "actions speak louder than words" may be applicable here. Usually, the only evidence available with respect to the existence of a conspiracy is that of disconnected acts on the part of the alleged individual co-conspirators. When taken together and considered as a whole, however, such acts may show a conspiracy or agreement as conclusively as would direct proof. In determining whether the conspiracy charged in Count One actually existed, you may consider all the evidence of the acts, conduct, and statements

of the alleged conspirators and the reasonable inferences to be drawn from those matters.

As I instructed you earlier, the essence of the crime of conspiracy is an agreement or an understanding to commit a crime. So it does not matter if the crime, the commission of which was the objective of the conspiracy, ever was committed. A conspiracy to commit a crime is an entirely separate and distinct offense from the actual commission of the illegal act that is the object of the conspiracy. The success or failure of a conspiracy is not material to the question of guilt or innocence of an alleged conspirator.

There are no one-man conspiracies. The crime of conspiracy has not been committed unless one conspires with at least one true co-conspirator. It is not enough for the government to show that the defendant you are considering agreed only with an undercover agent or a government informant to commit the underlying offense. In a case like that, there is no common understanding between two or more persons to violate the law.

Now, the conspiracy charged in Count One allegedly had one objective -- that is, it had a single illegal purpose, according to the allegations of the indictment, that the conspirators are alleged to have hoped to accomplish -- that was to commit wire fraud against one or more universities. I explained the elements of wire fraud to you already in charging

you on Counts One and Three. You will apply those instructions when you consider whether the government has proved beyond a reasonable doubt that the conspiracy charged in Count One existed. However, because Count One charges a conspiracy, the government does not need to prove that anyone committed the substantive crime of wire fraud. It need not prove beyond a reasonable doubt -- I misspoke. It need prove beyond a reasonable doubt only that there was an agreement to do so.

The indictment charges that the conspiracy charged in Count One lasted from at least in or about 2015 through at least in or about November 2017. It is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, but only that it existed for some time within that time frame.

In sum, in order to find that the conspiracy charged in Count One existed, the government must prove beyond a reasonable doubt that there was a mutual understanding, either spoken or unspoken, between two or more people to commit wire fraud.

If you conclude that the government has proved beyond a reasonable doubt that the conspiracy charged in Count One existed, you next must determine whether the defendant you are considering willfully joined and participated in the conspiracy with knowledge of its unlawful purpose, and with an intent to aid in the accomplishment of its unlawful objective -- that is,

the commission of wire fraud. The government must prove beyond a reasonable doubt by evidence of each defendant's own actions and conduct that he unlawfully, willfully, knowingly, and with specific intent to defraud entered into the conspiracy.

"Knowingly" and "willfully" have the same meanings here, as I described earlier with respect to the second element of substantive wire fraud.

A defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged conspirators, and the reasonable inferences that may be drawn from it.

Now, science has not yet devised a manner of looking into a person's mind and knowing what the person is thinking. To make that determination, you may look to the evidence of certain acts alleged to have taken place by or with the defendant or in his presence. As I instructed you earlier with respect to determining a defendant's knowledge and intent, you may consider circumstantial evidence based upon the defendant's outward manifestations, his words, his conduct, his acts, and all of the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

To become a member of the conspiracy, the defendant you are considering need not have known the identities of each and every other member, nor need he have known of all of their

activities. In fact, the defendant may know only one other member of the conspiracy and still be a co-conspirator.

Moreover, the defendant you are considering need tot not been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Proof of a financial interest in the outcome or another motive is not essential, but if you find that a defendant had such an interest or other motive, that's a factor you may consider in determining whether the defendant was a member of the conspiracy. The presence or absence of motive is, however, a circumstance that you may consider as bearing on the intent of the defendant you are considering.

The duration and extent of a defendant's participation has no bearing on the issue of a defendant's guilt. Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, others play only minor parts in a conspiracy. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of a conspiracy. Moreover, the defendant need not have joined the conspiracy at the outset. He may have joined at any time, and if he joined, still will be held responsible for the acts done before or after he joined.

I want to caution you, however, that the mere association by one person with another does not make that

person a member of the conspiracy even when coupled with knowledge that a conspiracy is taking place. Similarly, mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction. A person may know, or be friendly with, a criminal without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in a conspiracy.

I further instruct that mere knowledge of or acquiescence without participation in an unlawful plan is also not sufficient. The fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy does not make the defendant a member. What is necessary is that the defendant you are considering must have participated with knowledge of the unlawful purpose of the conspiracy, in this case, to commit wire fraud.

In sum, the government must prove beyond a reasonable doubt that the defendant you are considering, with an understanding of the unlawful nature of the conspiracy, intentionally engaged advised, advised or assisted the conspiracy in order knowingly and willfully to promote its unlawful goal. The defendant thereby becomes a conspirator.

A conspiracy, once formed, is presumed to continue until either its objectives are accomplished or there is some

affirmative act of termination by its members. So, too, once a person is found to be a member of a conspiracy, that person is presumed to continue being a member in the venture until the venture is terminated, unless it is shown by some affirmative proof that the person withdrew and disassociated himself from it.

Certain evidence was admitted during trial concerning acts and statements of others because such acts were committed and such statements were made by a person who, the government claims, was also a co-conspirator of the defendants.

The reason for allowing this evidence to be received against the defendants has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent of the other conspirators in carrying out the conspiracy.

In determining the factual issues before you, you may consider against the defendants any acts or statements made by any of the people that you find, under the standards I have already described, to have been co-conspirators, even though such acts or statements were not made in his presence, or were made without his knowledge.

Now, in this case, the defendants contend that the government's proof fails to show the existence of only one

overall conspiracy. Rather, they claim, there was no conspiracy at all or, alternatively, there was one or more conspiracy separate and apart from the conspiracy charged in Count One. Whether there existed a single unlawful agreement, or many such agreements, or indeed, no agreement at all, is a question of fact for you to determine in accordance with my instructions. So let me talk to you for a moment about how to approach that question.

In order to prove a single conspiracy, the government must prove beyond a reasonable doubt that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes. If the evidence shows that more than one conspiracy existed, you may still find that the conspiracy charged in Count One existed if it happens to be one of those conspiracies.

You may find that the conspiracy charged in Count One existed even if there were changes in personnel or activities over time, so long as you find that at least two of the conspirators continued to act for the duration of the conspiracy for the purpose charged in Count One -- that is, committing wire fraud.

If you are not convinced that the conspiracy charged in Count One existed, you cannot find any defendant guilty on

Count One. That is so even if you find that some conspiracy other than the one charged in Count One existed. Similarly, even if you find that a particular defendant was a member of another conspiracy, but not the one charged in Count One, then you must acquit the defendant on Count One.

Therefore, what you must do is determine whether the conspiracy charged in Count One existed. If it did, then you must determine the nature of the conspiracy and who were its members.

In sum, for each defendant, if you find that the government has met its burden on each of the two elements described above, then you should find that defendant guilty on Count One. If you find that the government has not met its burden with respect to either element as to the defendant you are considering, then you must find that defendant not guilty.

Now, you are going to have, in all likelihood, a redacted version of the indictment in the jury room. In any case, you have been told the substance of parts of it, and you will note that the indictment alleges that certain acts occurred on or about various dates. It doesn't matter if the evidence you heard at trial indicates that a particular act occurred on a different date. The law requires only a substantial similarity between the dates alleged in the indictment and the dates established by the evidence.

Now, those are the instructions on the law. I am now

going to talk to you a little bit about the trial process, about your evaluation of the evidence, and about the conduct of your deliberation.

You folks are the sole and exclusive judges of the facts. I certainly do not mean to indicate any opinion as to the facts or as to what your verdict ought to be. The rulings I have made during the trial, the questions I asked -- if in fact I asked any -- and any comments I may have made to the lawyers in managing the trial are not any indication of any views I might have about what your decision ought to be or as to whether or not the government has proved its case.

It is your duty to accept these instructions on the law and to apply them to the facts as you determine the facts to be, regardless of whether or not you agree with the instructions. You are to show no prejudice against an attorney, or the attorney's client, because the attorney objected to the admissibility of evidence, asked for a sidebar, or asked me to rule on questions of law. In addition, the fact that I asked questions or made comments is not intended to suggest that I believed or disbelieved witnesses or have any view about how you should decide the case. You are to disregard any of that entirely. You of course, however, may consider the answers to any questions I asked. Those are evidence. But any comments I may have made to counsel are to be disregarded.

You are to find the facts in this case without prejudice as to any party. The fact that the case is brought in the name of the United States does not entitle the government to any greater consideration than that accorded to the defendants. By the same token, the government is entitled to no less consideration. All the parties stand absolutely equal before the law.

Let me talk to you about evaluation of evidence. As I am sure I told you when you were selected, the evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, and the stipulations among counsel.

The indictment is not evidence. Not question, argument, or objection by a lawyer is evidence. You are not to consider any statements that I struck or told you to disregard, but it is up to you, and you alone, to decide the weight, if any, to be given to the testimony you heard and the exhibits you have seen.

There are two kinds of evidence you may use in reaching your verdict.

One type of evidence is called direct evidence. Direct evidence is when a witness testifies to something that the witness knows because the witness perceived it with his or her own senses. It is something the witness saw or felt or touched or heard, and if this were some other kind of case, tasted, I suppose. Direct evidence also may be in the form of

an exhibit. If this little styrofoam cup were an exhibit in this case, that would be direct evidence of what the characteristics of the cup are. You could look at it. You would have direct evidence that it is a white styrofoam cup.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. It refers to the process of inferring, on the basis of reason and experience and common sense, from one established fact the existence or nonexistence of some other fact, quite possibly a fact that you can't observe directly. Circumstantial evidence, whatever you may have heard on television, whatever you may have seen in the movies, is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct and circumstantial evidence.

I have talked to you before about stipulations. There are two kinds. There are stipulations of fact, which you are obliged to accept. There are stipulations as to what particular witnesses would have said if they testified here. As to those, you must accept that the witnesses would so have testified. Whether you credit that testimony or not, whether you think it is important or material or believable or not, that's up to you.

You have had the opportunity to observe all of the witnesses. It is now going to be your job to decide, to the extent it is important to your decision, how believable each

witness was in the testimony that was given. You are the sole judges of the credibility of the witnesses and of the importance of their testimony. In doing that, you will use your common sense; you will apply all of the tests for truthfulness and accuracy that you would apply with respect to important matters in your own everyday lives.

Your decision whether or not to believe a witness may depend on how the witness impressed you. Was the witness candid, frank, forthright? Or, did the witness seem as if the witness was hiding something, being evasive or suspect in some way? How did the witness testify on direct compared with how the witness testified on cross-examination? Was the witness consistent in his or her own testimony or did the witness contradict himself or herself? Did the witness seem to know what he or she was talking about? Did the witness strike you as someone who was trying to report his or her knowledge accurately?

If you find that a witness deliberately or willfully lied to you about an important matter, you may either disregard everything the witness said or you may accept whatever part of it you choose to believe. In other words, if you find that a witness lied under oath about a material fact, you may treat the testimony as a slice of toast that's been partially burned. You can either throw the whole piece of toast out, or you can scrape off the burned part and eat the rest. It is up to you.

Ultimately, the determination of whether and to what extent you accept the testimony of a witness is entirely up to you.

You should, in evaluating credibility of witnesses, consider whether the witness stands to benefit in some way from the outcome of the case. An interest in the outcome can create a motive to testify falsely. It can sway a witness to testify in a way that the witness perceives as likely to advance the witness's own interests. Keep in mind, though, that it does not automatically follow that testimony from an interested witness is to be disbelieved. It is for you to decide, based on your own perceptions and your own common sense, to what extent, if at all, a witness's interest has affected the testimony.

You have heard some testimony from a couple of law enforcement officers, two I believe. The fact that a witness may be, or may formerly have been, employed by the government in law enforcement doesn't mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, in considering the credibility of such a witness, you are entitled to consider whether the testimony may be colored by a personal or a professional interest in the outcome.

It is your decision, after reviewing all the evidence, whether to accept the testimony of those witnesses, and if so, to give the testimony whatever weight you think it deserves.

You have heard testimony from certain government witnesses who testified that they were actually involved in planning and carrying out the crimes charged in the indictment. There has been a fair amount said about these cooperating or accomplice witnesses in the summations of counsel and whether or not you should believe them.

Experience will probably tell you that the government frequently must rely on the testimony of witnesses who participated in the criminal activity about which they testify in a trial. For those reasons, the law allows the use of the testimony of cooperating or accomplice witnesses. In fact, in federal courts, the law is that the testimony of a cooperating or accomplice witness in itself may be enough for conviction if the jury believes that it proves the defendant guilty beyond a reasonable doubt.

So the testimony of accomplice witnesses is entirely appropriate for your consideration. The government argues, as it is entitled to do, that if such testimony couldn't be used, there would be many cases in which there was real guilt and conviction could not be had; it simply would be unattainable.

However, the testimony of accomplice witnesses should be scrutinized with special care and caution because such witnesses may believe that it is in their interest to give testimony favorable to the government. The fact that a witness is an accomplice can be considered by you as bearing on

credibility. As I said, however, it doesn't follow that simply because a person has admitted to participating in one or more crimes the person is incapable of giving a truthful account of what happened.

Like the testimony of any other witness, accomplice witness testimony should be given the weight you think it deserves, in light of the facts and circumstances in front of you, taking into account the witness's demeanor, candor, the strength and accuracy of recollection, their background, and the extent to which the testimony is corroborated or not corroborated by other evidence. You may consider whether an accomplice witness, like anybody else, has an interest in the outcome in deciding whether it has affected that witness's testimony.

You have heard testimony about various agreements between the government and accomplice witnesses. I must caution you it is of no concern of yours why the government made such agreements. Your sole concern is whether a witness has given truthful testimony in this courtroom before you.

In evaluating the testimony of accomplice witnesses, you should ask yourselves whether these witnesses would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be

best served by testifying truthfully? If you believe that a witness was motivated by hopes personal gain, was the motivation one that would cause him to lie, or was it one that would cause him to tell the truth? Did that motivation color the witness's testimony?

If you find that the testimony was false, you should of course reject it. If, however, after a cautious and careful examination of an accomplice witness's testimony and demeanor, you are satisfied that the witness told the truth, you should accept it as credible and act upon it accordingly.

As with any witness, let me emphasize that the issue of credibility does not have to be decided on an all-or-nothing basis. Even if you find that a witness testified falsely in some part, you still may accept their testimony in other parts, or you may disregard all of it. That's up to you.

You have heard testimony from one or more government witnesses who pled guilty to charges arising out of the same facts at issue in this case. I instruct you that you are to draw no conclusions or inferences of any kind about the guilt of the defendants on trial here from the fact that one or more prosecution witnesses pled guilty to similar charges. The decision of those witnesses to plead guilty was a personal decision those witnesses made about their own guilt. It may not used by you in any way as evidence against or unfavorable to the defendants on trial here.

You have heard evidence during the trial that some witnesses have discussed the facts of the case and their testimony with lawyers before the witnesses appeared in court.

Although you may consider that fact when you evaluate a witness's credibility, I should tell you that there is nothing unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he or she will be questioned about, focus on those subjects, and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Again, the weight you give to the fact or the nature of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

There are several persons whose names you have heard during the course of this trial but who did not appear here to testify. I instruct you that both sides had an equal opportunity, or lack of opportunity, to call any of those witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.

You should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

(Continued on next page)

THE COURT: You've heard reference in the testimony, and in the arguments of defense counsel, to the fact that certain investigative or other techniques were not used by the government. There is no legal requirement that the government prove its case through any particular means. While you are to consider carefully the evidence adduced by the government, you need not speculate as to why it used the techniques it did or why it did not use other techniques. The choice of law enforcement techniques is not your concern.

You have heard testimony about evidence that was seized in connection with searches conducted by law enforcement, for example, email evidence obtained pursuant to court-approved search warrants. You've heard also of recorded calls and conversations that were offered into evidence during the trial. I instruct you that all of the evidence in this case, including evidence obtained pursuant to searches and the recorded meetings and conversations played during the trial, properly was admitted in this case and properly is considered by you. Whether you approve or disapprove of the recordings of calls or conversations, or the uses of searches to obtain evidence, should not enter into your deliberations because I now instruct you that the government's use of that evidence is entirely lawful.

You must, therefore, regardless of any personal opinions, give that evidence full consideration along with all

the other evidence in the case in determining whether the government has proved each defendant's guilt beyond a reasonable doubt.

The defendants you now understand did not testify in this case. Under our Constitution, a defendant never is required to testify or to present any evidence because it is always the government's burden to prove a defendant guilty beyond a reason doubt. A defendant never is required to prove that he is innocent. You may not attach any significance to the fact that the defendants did not testify. You may not draw any adverse inference against a defendant because that defendant didn't take the witness stand. You may not consider this in any way in your deliberations.

Some of the people who may have been involved in the events leading to this case are not on trial here. You may not draw any inference, favorable or unfavorable, towards the government or the defendants, from the fact that any person other than the defendants is not on trial here. You may not speculate as to the reasons why that is so. Those matters are wholly outside the jury's concern. You may not consider them in any way in reaching your verdict as to these defendants. Your job is limited to considering the charges contained in the indictment and the three defendants before you.

The question of possible punishment of the defendants is of no concern to you and it should not, in any way, enter

into or influence your deliberations. The job of imposing sentence, should there be a conviction, rests entirely upon the Court. Under your oath as jurors, you cannot properly allow consideration of any punishment that may be imposed, in the event of a conviction, to allow that -- you may not allow that to influence your verdict in any way.

Now, you are going to retire to decide this case in just a couple of minutes. It is your duty as jurors to consult with one another and to deliberate with a view to coming to an agreement. Each of you must decide the case for yourself, but you should do so only after considering the case with your fellow jurors, and you should not hesitate to change an opinion if you are convinced that it is erroneous. Your verdict, whether guilty or not guilty, must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or the weight of the evidence merely for the purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and come to the conclusion which in your good conscience appears from the evidence to be in accordance with the truth.

A word about your notes.

Any notes you may have taken during the trial are for your personal use only. Each of you may consult your own notes

during deliberations, but any notes you may have taken are not to be relied upon during deliberations as a substitute for the collective memory of all of you. Your notes should be used as memory aids but should not be given precedence over your independent recollection of the evidence. If you didn't take notes, you should rely on your own independent recollection of the proceedings, and you should not be influenced by the notes of other jurors. I emphasize that the notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony and the evidence was.

As I mentioned at the start, you will be receiving copies of my written instructions in the jury room shortly after you retire. You will find that they contain what I think will strike most or probably all of you as hieroglyphics. There are legal citations after every paragraph or so. You are to pay them no mind. The chances are you won't understand what they refer to anyway because they are in lawyer code. They are worst than doctors' prescriptions. But they are my audit trail about where various legal principles come from. They are for the convenience of myself and counsel. You are to disregard all of them.

You are also certainly well aware by now that many of the exhibits have redactions, that is, parts that are blacked out, and the copy of the indictment that you are likely to receive also has parts that are blacked out. You are just to

disregard the redactions altogether. That was done for the sake of fairness and efficiency. You are not to speculate about what was blacked or why. Just deal with what you have in front of you that is legible.

You are not to discuss the case unless all twelve jurors are present. Ten or eleven of you are what I trust by now are a group of congenial friends, but you are not a jury unless all 12 of you are there.

When you retire, you should select one of the twelve of you as foreperson. That person will preside over deliberations and speak for you here in open court. If it becomes necessary to send in a note, the foreperson will write the note and send it in in a sealed envelope. When you have come to the verdict, should you do so, and I trust you will, the foreperson will notify the officer that there is a verdict -- not what the verdict is. You will just say, "We have a verdict."

I will be submitting to you, along with the written instructions, a verdict form on which to record the verdict. When you have reached a unanimous verdict, you will record your answers on one copy of the verdict form. Please do not add anything that is not called for by the verdict form. You will see the verdict form has a place to check "guilty" or "not guilty" as to each defendant on each count on which that defendant is named. Just put whatever the checkmarks are that

you find unanimously to be appropriate. No commentary. Please, no commentary. And then each of you will sign at the bottom, and the foreperson will tell the officer that there is a verdict. Don't give the verdict form to the officer. Put it in an envelope. The foreperson will bring it into court. You will hold on to it until I ask for it.

You should each be in agreement with the verdict. When the verdict is announced in open court, once it is announced in open court and officially recorded, it ordinarily cannot be changed or revoked.

A couple of other practical details here.

If during your deliberations you want me to discuss any further any of the instructions on the law that I have given you, the foreperson should compose a note, put it in a sealed envelope, give it to the officer, and the officer will pass it on to me.

Now, when you get the written instructions in the jury room, you will find that every page and line is numbered. And if the question relates to a particular part or parts of the charge, it would be very helpful if the foreperson's note indicates the page and line numbers that the question relates to. The process that happens when a note comes in is that I show the note to the lawyers. The lawyers have an opportunity to suggest to me what they think the right answer is. If everybody agrees, it is no problem. If everybody doesn't

agree, I ultimately decide what the right answer is. And the point of being specific about your questions is that the more precise your questions are, the more likely it is we can give you the answer you want and do it quickly. The more ambiguous it is, the longer we will discuss what you really mean and in all likelihood have some discussion about what the right answer is.

During the course of the deliberations, we will send the exhibits that are in evidence into the jury room. Now, we have not yet discussed how we will deal with the tapes should you want a tape played, played out loud. If you need a tape played out loud, you will let us know in a note unless we make other arrangements before then.

If you need to have testimony read back to you, the foreperson -- ah, I'm told the parties have apparently worked out what we do with the tapes. Is that right? Everybody is agreed on this or no?

MR. DISKANT: Yes, your Honor.

THE COURT: A clean laptop, that's all agreed? Yes?

MR. DISKANT: Yes.

MR. MOORE: Yes.

MR. HANEY: Yes, your Honor.

MS. DONNELLY: Yes.

THE COURT: So, we have a procedure for the tapes. You will have the tapes -- I think they are CDs -- I'm sure

they are CDs, and you will have a clean laptop by which I mean a laptop with nothing else on it. And so if you want to listen to a particular exhibit, you will have the CD, you will have the laptop, just play it to your heart's content. You also have the T exhibits. Right? So, you will have the transcripts as well.

OK. With respect to readbacks, if you need to have any of the testimony read back to you, the procedure is to send in a note telling us as precisely as you can what exactly you want to hear. Now, that could be with any level of specificity -- which witness, direct or cross, what subject. Just be as specific as you can, because we then have to figure out what you really want. You don't want to have a vague note and wind up listening to two hours of testimony for one paragraph, so it is in everybody's interest to be specific, but whatever you need we will get for you. It sometimes takes some time to organize a read back. Just bear that in mind because there are sidebars that have to be edited out and stuff like that, just practical considerations.

I will respond to questions, in respect, just as fast as I can.

The lawyers will be -- I normally have them wait in the courtrooms or right around the courtroom so that we can respond to notes instantly. The exception to that will be between 12:45 and 2, we will not respond to notes. And if we

are here during a dinner hour, we will not respond to notes during a dinner hour, but we'll keep those short, should that occur.

Now, one last thing about notes. If you communicate with the Court before there is a verdict, whether in the courtroom or by a note, you are never to indicate how the vote stands, if there is a division, unless I specifically ask you to tell me that, and I haven't done it yet in 24 years. So, no vote.

I remind you folks that you took an oath to render judgment fairly and impartially, without prejudice or sympathy, and without fear, based solely on the evidence in this case and the applicable law. It would be improper for you to consider, in reaching your decision as to whether the government has sustained its burden of proof, any personal feelings you may have about the race, religion, national origin, gender, or age of a defendant. If you let prejudice or sympathy interfere with your clear thinking, there is a risk that you will not arrive at a just verdict. All parties to this case are entitled to a fair trial. You must make a fair and impartial decision so that you'll come to a just verdict.

If you have a reasonable doubt as to a defendant's guilt, you should not hesitate for any reason to return a verdict of not guilty. On the other hand, if you should find that the government has met its burden of proving a defendant's

guilt beyond a reasonable doubt, you should not hesitate, because of sympathy or any other reason, to find that defendant guilty.

Now, does any counsel have any objection to the charge as delivered that I haven't ruled on previously? If so, come to the sidebar.

(Pause)

No indication.

OK. I'm told that there are two audio exhibits that are not yet on CDs. They will just come into the jury room later.

OK. Now we have to address the question the alternates asked on Thursday afternoon. If the twelve jurors try the case to a verdict, the alternates will be released and you will not deliberate with the jurors. And you will be able to go home, or about your affairs, in just a few minutes, but you are still alternates on this jury. You are subject to recall in the event, for example, that something happened to one of the jurors, or more than one of the jurors, God forbid. You will be recalled in order. It is essential that you not read or be exposed to any conversation or publication or anything else about this case until you know that the jury has returned a verdict or has been discharged. Andy will make sure he has your contact information. And while the chances are that you will not be recalled, there are no guarantees and

jurors have been recalled in the recent past because of some juror becoming ill or some other problem.

So you need to adhere to my instruction, but we may not see you again, and, therefore, on behalf of the defendants, their lawyers, the government, and myself, we thank you for your very attentive consideration of this case and for the time investment you have put into it. It's obviously very important in every case and this one is not an exception. So, you may now, the six of you, go into the jury room with Andy. Leave your notes with him and collect your other effects.

And I ask you, Alternate No. 1, you are still an alternate, but I'm going to ask you to remain for one minute while the other five jurors go inside.

So if Alternates No. 2 through 6 would now go into the jury room. And if everyone else will remain seated, I will see Mr. Peterson and lead counsel in the robing room.

And the courtroom remains locked.

OK. Mr. Peterson, counsel, lead counsel, in the robing room, Vinny.

(Continued on next page)

(In the robing room)

THE COURT: Have a seat.

OK. Counsel are all present. Mr. Peterson is present.

Mr. Peterson, previously you said you hadn't heard the instructions yet.

JUROR: Mm-hmm.

THE COURT: So you've now heard the instructions. Are you able to fairly and impartially judge this case based solely on the instructions and the evidence you have heard?

JUROR: Yes.

THE COURT: Counsel, any other inquiry?

MR. HANEY: No, your Honor.

MR. SCHACHTER: No, your Honor.

THE COURT: OK, you remain an alternate.

MR. DISKANT: And, to be clear, that would include putting out of his mind anything that would not impact --

JUROR: Yes.

THE COURT: Are you able to put out of your mind anything else you have read?

JUROR: Mm-hmm.

THE COURT: I need a word.

JUROR: Yes.

THE COURT: OK. Thank you, Mr. Peterson. You may rejoin the other alternates.

(Juror not present)

MR. MOORE: Your Honor, could I quickly raise one issue? And I thought about raising it, but I hate raising this in front of the jury. On page 47 of your charge where you address the issue of uncalled witnesses equally available, that is generally true with the exception of agents, like the undercovers. Those undercovers were not available to us. Your Honor ruled against us in our motion in limine with regards to their testimony, and the government has the ability to control them through the Touhy regulations and the like. So I just raise that point for the record.

MR. DISKANT: Your Honor, I disagree with that. Had Mr. Moore sought to call one of the agents, he did in fact submit the required certification under Touhy. We forwarded it to the FBI. There was never a time when any party sought to call any of these witness.

MR. MOORE: Well, I never received a response from the FBI to my request under Touhy. My understanding of the way --

THE COURT: And, Mr. Moore, if you had said to me, "Judge, they haven't responded and I want them," you'd have had them.

MR. MOORE: OK. All right. Yes, sir.

THE COURT: And this ship sailed last week, anyway.

MR. MOORE: I understand.

THE COURT: OK.

MR. MOORE: I thought about it while I was sitting there.

THE COURT: I understand. That is what good lawyers do.

OK. Let's go.

MR. MOORE: Good lawyers think about it early. Better lawyers think about it early.

(Continued on next page)

(In open court)

THE COURT: OK. As soon as we get the officer in, we are ready to go.

(Pause)

All right. The deputy will swear the officer.

(The court security officer was sworn)

THE COURT: Ladies and gentlemen, you will now retire to deliberate upon your verdict.

THE CLERK: Will the jury please come this way.

(Time noted at 12 noon, the jury began deliberations)

THE COURT: OK. Anything further?

MR. DISKANT: Your Honor, is it sufficient if one attorney for each side generally remains in the courtroom, or do you need all of them?

THE COURT: I don't need all of you as long as whoever remains is fully authorized to act.

MR. DISKANT: Very good.

THE COURT: OK. All right. Thank you.

Before you go, we will mark as Court Exhibit next in order one of the copies of the charge that will go in. If there is no objection, Andy will just take the charge in, take the verdict form in.

And then I was given a note that there are two audio exhibits that the government does not yet have on CDs. If everybody agrees, we will show the CDs to the defense and we

will send them in through Andy without any further on-the-record proceedings.

Is that acceptable, Mr. Schachter?

MR. SCHACHTER: Yes, your Honor.

THE COURT: Mr. Moore?

MR. MOORE: Yes, sir, your Honor.

THE COURT: Mr. Haney?

MR. HANEY: Yes, your Honor.

THE COURT: Mr. Diskant?

MR. DISKANT: Yes, your Honor.

And on that note, we have a proposed redacted version of the indictment. We just want to give defense counsel an opportunity to see it, but provided that they are amenable to it, is it the court's view that that will be sent back well?

THE COURT: It is.

OK, Mr. Schachter?

MR. SCHACHTER: Yes, your Honor.

THE COURT: Mr. Moore?

MR. MOORE: Yes, your Honor.

THE COURT: Mr. Haney?

MR. HANEY: Yes, your Honor.

THE COURT: Thank you.

(Recess pending jury verdict)

(Continued on next page)

(Time noted at 4:59 p.m.; jury not present)

THE COURT: Good afternoon, everyone. Bring in the jury.

(Jury present)

THE CLERK: Please be seated, everyone.

THE COURT: OK, members of the jury. I always see a jury the first thing in the morning and the last thing at night. So, you are done for today. We'll see you back at 11:15 tomorrow.

I should note that the defendants all are present.

Thank you very much and have a pleasant evening.

Do not discuss the case with anybody. Do not read anything about it.

OK. Thanks, folks.

THE CLERK: All rise.

(Jury not present)

THE COURT: OK. Anything else we need to do?

MR. MOORE: No, your Honor.

MR. HANEY: No, your Honor.

THE COURT: OK. Have a good evening.

(Adjourned to 11:15 a.m., October 23, 2018)